bankrupt's discharge until the creditor can perfect his claim in the state courts, so that it will not be affected by the discharge.[14] To consistently observe the distinction indicated by the principal case the court must be prepared to refuse such relief to a creditor who is enforcing a lien obtained without the bankrupt's consent. A thorough protection of the bankrupt's exemption, it seems, would require the administration by the Bankruptcy Court of all the bankrupt's property whether subject to the claims of creditors or exempt.

CONTINGENT REMAINDERS AS ASSETS IN BANKRUPTCY.—The Bankruptcy Act provides that "all property which" the bankrupt "could by any means have transferred or which might have been levied upon and sold under judicial process against him" shall pass to his trustee in bankruptcy.[1] The first description practically includes the second,[2] so that transferability is the broad test of the trustee's title; and this, in turn, cannot be reduced to any uniform rule since it depends upon the law of the jurisdiction in which the property is located.[3]

At common law, because of their speculative and uncertain character contingent remainders were regarded, not as estates, but mere possibilities.[4] If the contingency were only as to the happening of an uncertain event, the remainderman was said to have a "possibility coupled with an interest," and he could grant and devise it freely.[5] But if the uncertainty were as to the persons who should ultimately take, as in a devise to the survivors of a class after a life tenancy, the right of each of those presumptively entitled was so shadowy that, like the interest of an heir apparent in the estate of his ancestor, it was considered inalienable.[6] This proposition was subject to the fol-

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[14] *In re* Hatch (D. C. 1900) 4 Am. Bankr. Rep. 349; see *In re* Wells (D. C. 1900) 5 Am. Bankr. Rep. 308; *In re* Brumbaugh (D. C. 1904) 128 Fed. 971; 15 Harvard Law Rev. 152; Lockwood *v.* Exchange Bank, *supra; In re* Lantzenheimer (1903) 124 Fed. 716; see Gregory Co. *v.* Cale (1911) 115 Minn. 508; Fowler, Foster & Co. *v.* Wood (1886) 26 S. Car. 169. A discharge in bankruptcy does not affect a prior mortgage lien upon exempt property. Long *v.* Bullard (1886) 117 U. S. 617.

[1] Bankruptcy Act § 70a (5); Remington, Bankruptcy § 963.

[2] DeHaas *v.* Bunn (1845) 2 Pa. 335; Nichols *v.* Guthrie (1902) 109 Tenn. 535; see Freeman, Executions § 178.

[3] *In re* Shenberger (D. C. 1900) 102 Fed. 978; Nichols *v.* Levy (1866) 5 Wall. 433, 444.

[4] Robertson *v.* Wilson (1859) 38 N. H. 48; 4 Kent, Comm. *260; 9 Columbia Law Rev. 546. Although the term contingent remainder is properly used only in connection with interests in real property, it is commonly applied to legal and equitable interests in real and personal property, and for the purposes of the present discussion there seems no need of distinction.

[5] 2 Washburn, Real Property (6th ed.) 527.

[6] Roundtree *v.* Roundtree (1886) 26 S. C. 450, *In re* Bank's Will (1898) 87 Md. 425, 443. The interest of an unascertained contingent remainderman, like that of an heir apparent, is sometimes termed a "bare possibility", but it is clearly distinguishable from the latter since it arises by express limitation. See note 33 L. R. A. 266, 267.

In Maine and Massachusetts, "When a contingent remainder, executory devise, or estate in expectancy is so limited to a person that it will, in

lowing qualification: that in a proper case, equity would enforce the attempted conveyance of such a possibility as an executory contract if the grantor subsequently acquired title,[7] and even at law he was estopped to assert any claim against his grantee where the conveyance contained a clause of warranty.[8] Since the practical result is to divest the remainderman of all the attributes of ownership, may it not be said that it is a transfer of property within the broad definition of the Bankruptcy Act?[9] In the one case the very fact of enforcing the conveyance as an executory contract, and in the other the resort to estoppel to prevent the grantor from asserting the truth of the matter, seems predicated upon the fact that the grantee acquired no present interest in the property, but merely a conditional contract right against the grantor. It seems clear, therefore, that in neither case is there a present property right which is capable of transfer, and it follows that the trustee would acquire no title under the provision of Sect. 70a (5).[10] Accordingly, in the absence of statute, it is usually held that the interest of an unascertained contingent remainderman is not an asset in bankruptcy.[11]

It may well be doubted, however, whether the common law distinction between a remainder contingent as to the happening of an event, and one uncertain as to the persons ultimately entitled to enjoyment, is deserving of preservation in modern law, as it rests on no fundamental difference either in the nature of the contingency, or the likelihood of its occurrence. It seems even questionable whether there is a true distinction at all, since many limitations may be construed with equal logic as belonging to either class.[12] Recognizing such a situation as unsatisfactory, some courts have of their own initiative thrown off the shackles of the old rule,[13] while in other jurisdictions the con-

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case of his death before the happening of the contingency, descend in fee simple to his heirs, he may, before it happens, convey or devise it subject to the contingency". Maine R. S. (1903) c. 75, § 3; Massachusetts R. L. (1902) c. 134, § 2. Under this statute an unascertained remainderman in fee simple has an alienable interest. Belcher *v.* Burnett (1879) 126 Mass. 230.

[7]Stover *v.* Eycleshimer (N. Y. 1865) 46 Barb. 84. An attempted conveyance by an heir apparent is similarly enforced. Clendening *v.* Wyatt (1895) 54 Kan. 523.

[8]Read *v.* Fogg & Whittimore (1872) 60 Me. 479: Walton *v.* Follansbee (1890) 131 Ill. 147, 160.

[9]"'Transfer' shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security." Bankruptcy Act, § 1 (25).

[10]See 9 Columbia Law Rev. 547. Remington, Bankruptcy § 971.

[11]*In re* Bank's Will, *supra.* Similarly with regard to the expectancy of an heir apparent. Moth *v.* Frome (1761) Ambl. 394.

[12]For example, a devise to A for life and at his death to the surviving children, was regarded in Haward *v.* Peavey (1889) 128 Ill. 430, as creating a remainder which was certain as to event and uncertain as to person, while, in Putnam *v.* Story (1882) 132 Mass. 205 and Bodenhamer *v.* Welch (1883) 89 N. C. 78, a similar gift was held to vest a remainder in ascertained persons which was contingent only as to the event of their surviving the life tenant.

[13]Putnam *v.* Story, *supra;* Godman *v.* Simmons (1892) 113 Mo. 122.

troversy has been settled by statute.[14] Under such an enactment the New York Court of Appeals, in the recent case of *Clowe* v. *Seavey et al.* (1913) 102 N. E. 521, in passing upon the question for the first time,[15] held that a devise to A and his descendants at a future time might be vested or contingent, but that in either case the remainder would pass to the trustee in bankruptcy, thus adopting the plain meaning of the statute. Where the gift was in the form of a mere direction to trustees to pay to the undesignated members of a class to be ascertained upon the happening of a future event, a contrary result was reached in several earlier federal cases, on the theory that the testator intended no present interest to pass to the remaindermen.[16] Inasmuch as the effect of the will was to create a remainder, however, and since mere intention can never avoid positive rules of law, such an interest would seem alienable irrespective of the testator's intention. The New York court's position seems preferable, but in any event should be followed in subsequent federal cases, as the state courts' interpretation of a statute involving property rights is authoritative.[17]

MEASURE OF DAMAGES FOR RATE DISCRIMINATION BY CARRIERS.—A common carrier in the absence of statute is not bound to charge everyone equally for his services,[1] but he must refrain from unjust or unreasonable discrimination.[2] The question as to what constitutes such

[14]N. Y. Real Property Law § 40. "A future estate is either vested or contingent. It is vested when there is a person in being who would have an immediate right to the possession of the property on the determination of all the immediate or precedent estates. It is contingent while the person to whom or the event on which it is limited to take effect remains uncertain."

§ 59. "An expectant estate is descendable, devisable and alienable in the same manner as an estate in possession."

The above sections have been adopted practically word for word in the following states: California, Civ. Code, 1909, §§ 694, 695, 699; District of Columbia, Code of Law 1911, §§ 1022, 1030; Idaho, Rev. Code, §§ 3061, 3062, 3065; Michigan Comp. L. 1897, §§ 8795, 8817; Minn. Gen'l Stat. 1913, §§ 6663, 6685; North Dakota, Code, §§ 4729, 4730, 4734; South Dakota, Civ. Code, §§ 209, 210, 214; Wisconsin, Statutes 1898, §§ 2037, 2059.

In Iowa, Code § 48, Par. 8 "Real Estate includes land, tenements, and hereditaments, and all rights thereto and interests therein." In New Jersey, Comp. Stat. 1910, Conveyances §19. "Transfers of estates of expectancy authorized." In Rhode Island, General Laws, 1909, c. 252, § 23 "Contingent and executory interests and a possibility coupled with an interest may be transferred by deed or will." In Virginia, Code § 2418, and West Virginia, Code § 3024. "Any interest in or claim to real estate may be disposed of by deed or will.

[15]The similar case of National Park Bank *v.* Billings (N. Y. 1911) 144 App. Div. 536, affirmed, 203 N. Y. 556 is not a clear authority where the gift is merely to a class, since there the members were individually named.

[16]*In re* Hoadley (D. C. 1900) 101 Fed. 233; *In re* Wetmore (D. C. 1900) 102 Fed. 290, affirmed (C. C. A. 1901) 108 Fed. 520; *In re* Gardner (C. C. 1901) 106 Fed. 670. And note that in Ward *v.* Ward (C. C. 1904) 131 Fed. 946, *contra,* the remaindermen were individually named.

[17]*In re* Hoadley, *supra;* see 10 Columbia Law Rev. 242.

[1]4 Elliott, Railroads (2nd ed.) § 1467.

[2]This is a logical development of the rule that a carrier is limited to a reasonable compensation for his services, owing to their public nature. 2 Hutchinson, Carriers (3rd ed.) § 521.